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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 355

MICHAEL JACKSON, b/n/f, his father, JOE W. JACKSON; JOE W. JACKSON; DOROTHY F. JACKSON; BARRY STEVEN BARNES, b/n/f, his father, BILLY BARNES; BILLY BARNES; and SHIRLEY BARNES,

Petitioners,

— v. —

C. R. DORRIER, K. HARLAN DODSON, JR., FRANK GRISHAM, L. C. BIGGS, I. T. CRESWELL, MRS. IRWIN B. ESKIND, WALDEN S. FABRAY, MRS. C. F. MAGER, and S. L. WRIGHT, JR., all being members of the Metropolitan County Board of Education of Nashville, Davidson County, Tennessee; DR. JOHN H. HARRIS, Metropolitan Director of Schools; and JIMMY EDWARDS, Principal of Donelson High School,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

MICHAEL JACKSON, b/n/f, his father, JOE W. JACKSON; JOE W. JACKSON; DOROTHY F. JACKSON; BARRY STEVEN BARNES, b/n/f, his father, BILLY BARNES; BILLY BARNES; and SHIRLEY BARNES,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions Below

The opinion of the District Court for the Middle District of Tennessee is unreported. The opinion of the Court of Appeals for the Sixth Circuit is reported at 424 F.2d 213. The opinion of the Court of Appeals is appended at 1a and the oral and written opinions of the district court are appended at 12a and 15a, respectively.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Sixth Circuit were entered on April 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether requiring a student to cut his hair as a prerequisite to attending a public high school violates his and his parents' fundamental right of privacy guaranteed by the first amendment and the "penumbra" of the first, third, fourth, fifth, ninth and fourteenth amendments.

(2) Whether the suspension of a student from a public school for wearing long hair violates the due process clause of the fourteenth amendment.

(3) Whether the expulsion of a student from public high school for wearing long hair denies him the freedom of expression protected by the first amendment.

(4) Whether a regulation which defines a class of students as undesirable solely because of the length of their hair is an unreasonable classification in violation of the equal protection clause of the fourteenth amendment.

Regulation Involved

Guide for Professional Personnel of the Public Schools of Metropolitan Nashville-Davidson County, Tennessee, § 16:

> Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A student is not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement.

Statement

The petitioners, Michael Jackson and Barry Barnes, are both juveniles. Both are required by law to attend school. *Tenn. Code Ann.* § 49-1708. They attended Donel-

son High School in Donelson, Tennessee, a suburb of Nashville, through the end of the 1967-68 school year. (A.[1] 12, 27) On the opening day of school for the 1968 fall term, each was sent home and a week later their parents received a suspension notice from the principal of Donelson High School. (A. 14, 25, 54) The parents were told that their sons would not be permitted to attend school until they had cut their hair. (A. 14, 25) The students' hair did not conform to unwritten, but detailed, specifications on hair style (regulating length, style of cut on the front, back, and sides, sideburns, mustache, and beard, see A. 76).

Because the petitioners were members of a musical group known as the Purple Haze and considered the length of their hair a material factor in their quest for a successful musical career (see A. 30), and because each boy's respective parents approved of his appearance (see parents' testimony A. 11-41 *passim*), action was begun in an effort to reverse the principal's decision. After communications with school officials and the Metropolitan School Board failed to produce a meaningful dialogue, the petitioners brought this action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

The district court dismissed the complaint, ruling after an evidentiary hearing that the first amendment provided no protection (apparently because "commercial purposes" were involved), the suspensions accorded with due process and equal protection, and the foregoing regulation and the requirements of the principal thereunder were reasonable. (12a - 14a)

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[1] "A." denotes the printed Appendix filed with the Court of Appeals, a copy of which is filed herewith.

The court concluded:

> I think the proof is very clear here that although the disturbances may be fairly minimal that there is some disturbance by other students both male and female looking at boys who represent an extremely small minority[2] in the way that they conduct their personal grooming and wear their hirsute adornments. (A. 158)

Although attempts to prove disturbance were the primary thrust of the defense presentation, petitioners cannot more accurately summarize the embarrassingly trivial nature of the "disturbances" than to accept literally the district court's characterization — "other students . . . looking at . . . them."

The court of appeals affirmed, holding that there was sufficient evidence to establish the regulations had a reasonable connection with the administration of the school system, in that they were reasonably calculated to maintain school discipline. The court, acknowledging its conflict with *Breen* v. *Kahl*, 412 F.2d 1034 (7th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3478 (June 1, 1970), relied primarily on *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968), and *Tinker* v. *Des Moines School District*, 393 U.S. 508 (1969).

Reasons for Granting the Writ

The decision below, using the letter of the *Tinker* case to deny its essence, stands as another of the growing number of confusing, divergent decisions with conflicting and contradictory analyses.

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[2] Destined to remain a small minority indeed for so long as their very presence is prohibited, as it has been for more years than the principal can remember. (A. 77, 80)

The complex of rights of expression, association, privacy, and freedom from arbitrary action here involved presents some "[d]ifficulty . . . as it did in *Griswold* v. *Connecticut*, 381 U.S. 479 . . . (1965), in determining which provision of the Constitution of the United States [is] offended . . . ." *Breen* v. *Kahl*, *Supra*, 296 F. Supp. at 706. The subject is perhaps best subsumed under the ninth amendment.[3] It should be clear that:

> "The makers of our Constitution . . . . conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Stanley* vs. *Georgia*, 394 U.S. 557, 564 (1969).

1. The two leading "long-hair school cases," *Ferrell* v. *Dallas Independent School District*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968), and *Breen* v. *Kahl*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3478 (June 1, 1970), are contradictory in their approach to the constitutional rights of public school students.

On the subject of hair alone, the following recent cases, reaching the *Breen* result through various analyses, are in opposition to the decision here:

1. *Boyle* v. *Scapple*, 38 U.S.L.W. 2614 (D. Ore. Apr. 24, 1970)

2. *King* v. *Saddleback Junior College District*, Civ. No. 69-2501-HP (C.D. Cal. Jan. 7, 1970)

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[3] "[T]he rights of individuals to act without inhibition by governmental restrictions that accomplish no social purpose." Ratner, *The Function of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1071 (1968); see *id.* at 1068-70.

3. *Sims* v. *Colfax Community School District*, 307 F. Supp. 485 (S.D. Iowa 1970)

4. *Calbillo* v. *San Jacinto Junior College*, 304 F. Supp. 857 (S.D. Tex. 1969)

5. *Westley* v. *Rossi*, 305 F. Supp. 706 (D. Minn. 1969)

6. *Olff* v. *Eastside Union High School District*, 305 F. Supp. 587 (N.D. Cal. 1969)

7. *Richards* v. *Thurston*, 304 F. Supp. 449 (D. Mass. 1969)

8. *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969)

9. *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969)

10. *Zachry* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967)

11. *Meyers* v. *Arcata High School District*, 269 Cal. App. 2d 64, 75 Cal. Rptr. 68 (1969)

12. *Finot* v. *Pasadena City Board of Education*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967)

Cases to the contrary (*i.e.*, allowing suspensions for hair styles) are:

1. *Brownlee* v. *Bradley County Board of Education*, 38 U.S.L.W. 2567 (E.D. Tenn. Apr. 10, 1970)

2. *Neuhaus* v. *Torrey*, 310 F. Supp. 192 (N.D. Cal. 1970)

3. *Stevenson* v. *Wheeler County Board of Education*, 306 F. Supp. 97 (S.D. Ga. 1969)

4. *Brick* v. *Board of Education*, 305 F. Supp. 1316 (D. Colo. 1969)

5. *Crews* v. *Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969)

6. *Davis* v. *Firment*, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969)

7. *Akin* v. *Board of Education*, 262 Cal. App. 161, 68 Cal. Rptr. 557 (1968), *cert. denied*, 393 U.S. 1031 (1969)

8. *Leonard* v. *School Committee of Attleboro*, 394 Mass. 704, 212 N.E. 2d 468 (1965)

The confusion in the state and federal courts makes this issue particularly appropriate for early attention by this Court.

2. The court below erroneously concluded that the slightest inconvenience or disturbance within the public school system justifies subordination of the valid desires of parents in the manner they wish to rear their child and the child's right to express himself through his manner of appearance to tenuous and speculative state interests.

3. The dress code here is substantially similar to dress codes, where they exist, throughout the country. A ruling as to the validity of this particular regulation would aid school administrators across the nation in delineating the boundaries in this non-curricular area between appropriate and inappropriate.

4. Even assuming the validity of the *Ferrell* approach, the courts below erred in applying its reasoning to the facts in this case. Here, unlike *Ferrell*, there was no public display, no substantial disruption of school functions and no material confrontation on school grounds.

Conclusion

Appellants heartily agree with the import of the district court's statement "Thank God, the federal courts have not yet been asked to determine exactly how long hair can be grown." (14a) But this is no more the business of the schools than of the courts. If the schools would

concentrate on education, the antithesis of indoctrinative regimentation to conformity (the apparent goal of the school, see A. 147), then all could get about their more pressing business. But settling controversy is still the accepted function of the courts; dictation of style is not that of the schools. Education is too important a right to be denied or granted on the basis of shifting standards of personal appearance.

The students here were faced with a rule that they saw as arbitrary, unresponsive to real life conditions, at variance with images they continually saw in the mass media, and contrary to the model of American individualism. They responded rationally — they took their grievance to court under the umbrella of the Bill of Rights. There their vision was confirmed — in justification of the rule their adversaries could only produce makeweights and vague generalities, and condemn them for being looked at.

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No. 19351

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL JACKSON, ET AL.,
Appellants,
v.
C. R. DORRIER, ET AL.,
Appellees.

APPEAL from United States District Court for the Middle District of Tennessee.

Decided April 6, 1970.

Before PHILLIPS, Chief Judge, BROOKS, Circuit Judge,* and MACHROWICZ, District Judge.**

PER CURIAM. This case involves the timely subject of long hair worn by teenage male high school students.

The Metropolitan Board of Education of Nashville and Davidson County, Tennessee, adopted the following regulation in 1961:

> "Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A stu-

* Honorable Henry L. Brooks, Chief Judge, U. S. District Court for the Western District of Kentucky, sat on this case by designation on October 1, 1969. On December 12, 1969, his oath was administered as a judge of this Court.

** Honorable Thaddeus M. Machrowicz, Judge, U. S. District Court for the Eastern District of Michigan, sitting by designation. This case was assigned to Judge Machrowicz for preparation of the opinion. The opinion had not been completed at the time of the death of Judge Machrowicz on February 17, 1970. Prior to his death Judge Machrowicz and the other members of the panel had agreed upon the decision announced in this opinion.

> dent is not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement."

Under this regulation the students at Donelson High School were told, as to hair on male students, that hair in the front may not come below the eyebrows, ears must show clear of hair and hair in the back is to be tapered and not be long enough to turn up.

Two male students, Michael Jackson and Barry Steven Barnes, who were members of a combo band known as "The Purple Haze," permitted their hair to grow longer than prescribed by school officials. After conferences with the students and their parents the students were suspended by the principal and sent home for violation of the regulation. After additional conferences a hearing was conducted before the Board of Education. The Board sustained the action of the principal.

This suit was filed by the two students and by their parents, suing as individuals and as next friends of their minor sons. Jurisdiction is asserted under 28 U.S.C. § 1343.

District Judge Frank Gray, Jr., conducted an extensive hearing and denied injunctive relief. He made an affirmative finding of fact to the effect that the evidence unquestionably establishes that the regulation has a real and reasonable connection with the successful operation of the educational system, in that it is reasonably calculated to maintain school discipline. He held that the evidence failed to show that the students have been deprived of any constitutional rights.

We affirm.

The complaint charges that the student plaintiffs have

been deprived of certain rights guaranteed by the Constitution of the United States; that the defendant school officials, having the authority and duty to promulgate plans, rules and regulations for the administration and operation of the public school system, wrongfully refused to enroll these two students at Donelson High School for the school year beginning September 1968 on the ground that their hair was too long, that they wore mustaches, and in the case of Barnes, a beard; and that the two students were informed that their appearance constituted "improper grooming" which amounted to "distracting attire." The complaint sought a declaration that the above quoted regulation is invalid. It prayed that defendants be compelled to readmit these two students to Donelson High School and that defendants be enjoined from conditioning attendance at school on the length of hair or the presence of a beard or mustache.

At the evidentiary hearing before the District Court it was established that the standards of neatness in personal appearance and dress set forth in the above-quoted regulation are communicated to students at Donelson High School each year by announcements over the school intercom and in assembly programs. They are discussed in home rooms and are the subject of conferences with individual students. Specific information is given to members of the student body as to the maximum length permitted for the hair of male students.

Jackson and Barnes began to run afoul of these rules during the 1967-68 school year. During that year they were members of the "Purple Haze" combo band and began to let their hair grow longer.

Barnes was absent from school 38 days and Jackson was absent 46 days and tardy 24 days during that school

year. The principal wrote Jackson's parents in October 1967 concerning his absences and tardiness. He pointed out that on more than one occasion Jackson had been absent from school during the day and played with his combo band that night and that he had been averaging being away from school one day out of every four in addition to his tardiness. Proof was introduced that the grades of both boys dropped during the 1967-68 school year. Jackson ended the year with grades of D, C, F, D and B (Physical Education) and Barnes with grades of D, F, D, D and C (Art) and B (summer session 1967).

During the 1967-68 school year the principal informed Jackson and Barnes that their hair styles were not in conformity with the regulation. There was evidence that during the 1967-68 terms the long hair of these two students became a distracting influence in the school. Even though the two students failed to conform to the rules, after warning, no disciplinary action was taken against them during the 1967-68 school year and they were permitted to complete that academic year without changing their hair styles. The principal told Barnes that he would have to get his hair cut before returning to school in the fall. During the summer of 1968 both boys let their hair grow longer. When the new school term opened in September 1968 Jackson presented himself with hair over the lapel of his coat in the back and down to the tips of his earlobes on the sides, and with sideburns and a mustache. Barnes appeared with hair down to his shoulders and with a mustache, a beard and long sideburns.

After a conference the principal suspended the two students for violation of the regulation. He followed the suspension procedure prescribed by the Board of Education, filling out written suspension forms in quadruplicate. One copy was sent to the parents of the students,

one copy to the director of school personnel, and one copy to the area superintendent and the fourth copy was kept in the school's files. The principal held conferences with parents of the two students. The case then was referred to the Pupil Personnel Department of the Metropolitan school system. The Director of Pupil Personnel Services held a conference with the parents and advised them of their right to appeal from the action of the principal to the Metropolitan Board of Education.

The parents appealed to the Board of Education. A hearing was held before the Board on September 19, 1968. At this hearing the parents made full statements of their position and also questioned the principal of Donelson High School in the presence of the Board.

The Board upheld the action of the principal in suspending the students for violation of its regulation.

The District Court made a finding of fact to the effect that the regulation here attacked, as interpreted and enforced by the principal of Donelson High School, has a real and reasonable connection with the successful operation of the educational system and tends to help maintain school discipline. He further found that the evidence failed to show that the students have been deprived of any constitutional rights. Findings of fact of the District Court will not be disturbed on appeal unless they are "clearly erroneous." Rule 52(a), Fed. R. Civ. P. We find substantial evidence in the record to support the findings of the District Judge.

There is evidence to support the conclusion that the wearing of excessively long hair by male students at Donelson High School disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students and interfered with the educational pro-

cess. Members of faculty of Donelson High School testified that the wearing of long hair by Jackson and Barnes was an obstructing and distracting influence to a wholesome academic environment. A teacher of history and social studies stated that two boys with long hair were a distracting influence in her class; that they were "constantly combing, flipping, looking in mirrors and rearranging their hair," attracting the attention of other students and interfering with classroom teaching; and that the train of thought of both the students and teachers was interrupted. An English teacher testified that she often asked a boy to put away his comb and refrain from combing his hair in class. She described long hair on male students as a disturbing and distracting influence on educational processes in her classes and other school activities at Donelson High School. A teacher of industrial arts testified that girls with long hair were required to wear hair nets as a safety precaution and that long hair on boys was a safety hazard in shop work. One teacher said that other students pay more attention to a boy with long hair than to what the teacher is trying to teach. Another teacher testified that when her class was attended by the boys with long hair hardly a day would go by that she would not have to interrupt her teaching and say: "Put your combs away. This is not a beauty parlor. This is a school classroom."

Other teachers testified to like effect before the District Judge, along with several Donelson High School students, including the vice president of the student body and the president of the senior class. The vice president of the student body described how the long hair of Jackson and Barnes, and their disobedience of the school regulation, set off a chain reaction of conversation, speculation and excitement among other students at the

beginning of the 1968-69 school term. He testified concerning a threat by some of the students to cut off the long hair of Jackson and Barnes.

The principal of Donelson High School testified that he had complaints from teachers that Jackson and Barnes, because of their long hair, were a disturbing and distracting influence in their classes.

The record establishes that the deliberate flouting by Jackson and Barnes of this well publicized school regulation created problems of school discipline.

It is contended that enforcement of the regulation deprived the two students of freedom of speech and expression in violation of the First Amendment. Neither of the students testified that his hair style was intended as an expression of any idea or point of view. We agree with the finding of the District Court that this record does not disclose that the conduct of Jackson and Barnes and the length of their hair were designed as an expression within the concept of free speech. Therefore *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), has no application. The Supreme Court in that case said:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. Cf. *Ferrell v. Dallas Independent School District*, 392 F.2d 697 . . ." 393 U.S. 507-08.

The record supports the finding of the District Judge that Jackson and Barnes pursued their course of personal grooming for the purpose of enhancing the popularity of the musical group in which they performed. We agree with Judge Gray that "the growing of hair for purely commercial purposes is not protected by the First Amendment's guarantee of freedom of speech."

It is further contended that the action of school officials violated the due process clause of the Fourteenth Amendment. The evidence shows that the two students were afforded ample opportunity to be heard and that the procedural and substantive requirements of due process were met by conferences conducted by the school principal and by the hearing before the Board of Education. We agree with the District Judge that:

> "To hold that the relationship between parents, pupils and school officials must be conducted in an adversary atmosphere and accordingly the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved."

We also agree with the District Court that the regulation enforced in this case is not void for vagueness and overbreadth, but to the contrary, as applied to these two students, was quite specific. The record shows that the principal of Donelson High School interpreted and administered the regulation in such a way as clearly to inform all students, including the two involved in this case, as to what was required of them with regard to personal grooming. There can be no doubt that Jackson and Barnes had adequate notice of what was expected of them and deliberately chose not to comply with the regulation.

Appellants further contend that they have been deprived of the equal protection of the law in violation of the Fourteenth Amendment. As held by the District Court:

> "[T]he record is absolutely devoid of any proof that the regulation's application in this case was the result of selective enforcement of the regulation against these students, so as to sustain the allegation

that they have been denied the equal protection of the law."

As previously stated, substantial evidence supports the finding of the District Judge that the regulation has a real and reasonable connection with the successful operation of the educational system and with the maintenance of school discipline.

It is further contended that the constitutional right of privacy of the students and their parents has been impaired in violation of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. We find the contention to be without merit under the record in this case. In our opinion *Griswold* v. *Connecticut*, 381 U.S. 479, has no application here.

The facts in this case are strikingly similar to those involved in *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856. The holding in *Ferrell* is significant because of the Supreme Court's reference to it in the above quotation from *Tinker*, 393 U.S. 508.

To like effect see *Davis* v. *Firment*, 408 F.2d 1085 (5th Cir.), affirming, 269 F.Supp. 524; *Crews* v. *Cloncs*, 303 F.Supp. 1370 (S.D. Ind.); *Glangreco* v. *Center School District*, —— F.Supp. —— (W.D. Mo.) Sept. 25, 1969.

We have also considered decisions holding to the contrary, including *Breen* v. *Kahl*, —— F.2d —— (7th Cir.), 38 U.S.L.W. 2332, affirming, 296 F.Supp. 702; *Richards* v. *Thurston*, 304 F.Supp. 449 (D. Mass.); *Miller* v. *Gillis*, —— F.Supp. —— (N.D. Ill.) Sept. 26, 1969; and *Olff* v. *East Side Union High School District*, 305 F.Supp. 557 (N.D. Calf.).

Having found no violation of constitutional rights, we are not prepared to hold that the regulation here in ques-

tion and the interpretation and application placed upon it are beyond the power of school officials and the Board of Education, as applied to public elementary and high schools, provided there is adequate compliance with due process standards. The students here involved were accorded an adequate hearing before school authorities and the Board of Education and a thorough evidentiary hearing before the District Judge.

In *Epperson* v. *Arkansas*, 393 U.S. 97, 104, the Supreme Court said:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

In *Tinker* v. *Des Moines School District*, *supra*, the Court said:

> "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507.

In the absence of infringement of constitutional rights, the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee.

We follow *Ferrell* v. *Dallas Independent School District, supra,* in holding that the District Court committed no error in dismissing the present case.

Affirmed.

ORAL OPINION OF THE DISTRICT COURT

[178] THE COURT: The Court has considered the evidence that has [179] been submitted. The Court has considered the three affidavits and read the three affidavits which have been admitted. I find first that there is no legal basis for any injunctive relief requiring the defendant school board to re-admit these two students to Donelson High School.

I'm going to write a memorandum that will set forth in detail my reasons, but let me say briefly that the First Amendment to the Constitution of the United States providing for freedom of speech provides no protection for the growing of hair for commercial purposes. If that growing of hair had something to do with an expression of opinion, such as a religious belief or political belief or something of that sort, it might have some possible connection with the First Amendment.

But in this case we have asserted by the complaint that the only reason they grow hair and wear their hair in this method is for commercial purposes. That is specifically stated in a brief paragraph in the complaint.

Therefore, there is no First Amendment protection afforded for such wearing of hair, mustaches and a beard.

Second, the issue of due process. The hearing which was had here throughout certainly complies with any requirement of due process where there is no First Amendment right involved and in my opinion would probably suffice even if a First Amendment right were involved.

[180] Proceeding next to the Fourteenth Amendment to the Constitution of the United States providing for equal protection of the laws, it is my opinion that the regulation has been promulgated by the Board of Education under which principals are given some discretion

with reference to determining what is proper attire and what is proper grooming doesn't deprive these two young men of any right otherwise afforded to everyone else.

Specifically they're not deprived of the right to obtain an education under the free education system of the State of Tennessee because they can do it by abiding by regulations that have some reasonable foundation in fact.

I do not find because it is not my function to find that the interpretation given by the principal of this high school that hair should come down and half way down the ear and not hit the collar in the back is the final determination of any such question. Thank God, the federal courts have not yet been asked to determine exactly how long hair can be grown, but there is a reasonable relationship between the regulation that has been promoted and the educational function.

The only purpose of having schools is to teach people. The only reason for people going to school is to learn. Anything that happens in a school room that disturbs even for one minute the educational process, if it can be avoided, should be avoided.

[181] I think the proof is very clear here that although the disturbances may be fairly minimal that there is some disturbance by other students both male and female looking at boys who represent an extremely small minority in the way that they conduct their personal grooming and wear their hirsute adornments.

For that reason I find that there is no basis for the issuance of a preliminary injunction as prayed.

An order will go down and an opinion will go down also setting forth other reasons.

If nothing further, court is in recess.

[Reporter's Certificate]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MICHAEL JACKSON, ET AL.
vs.
C. R. DORRIER, ET AL.
} Civil No. 5204

MEMORANDUM

A hearing was had October 17, 1968, on plaintiffs' application for a preliminary injunction. At its conclusion the application was denied. Subsequently, counsel agreed that the hearing had could be considered as a final hearing on the merits. Accordingly, for the reasons set forth herein, the clerk will enter judgment for the defendants.

This action was brought by Michael Jackson and Barry Steven Barnes, minors, by next friends, and by their parents, seeking to compel the admission of the minor plaintiffs to Donelson High School for the 1968-69 school term. The defendants are the Principal of the school, Jimmy Edwards, the Metropolitan Director of Schools, and the Metropolitan County Board of Education. When they sought to enroll for the fall semester September 3, 1968, the minor plaintiffs were denied admission by defendant Edwards because of the length of their hair, it being very long, completely covering their ears and hanging below their collars. In addition, both students wore mustaches and one also wore a beard.

The action taken by the principal in refusing to admit them was based on his interpretation of a regulation

promulgated by the defendant Board of Education, and contained in its *Guide for Professional Personnel*, Article V, § 16, as follows:

> "16. DRESS. Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A student is not appropriately dressed if he is a disturbing influence in the class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement."

Upon review of the action of the principal, both the Pupil Personnel Department of the Metropolitan School System and defendant Board of Education upheld his decision. In this action plaintiffs seek to have this regulation declared invalid, and they ask that the court issue an injunction compelling the defendants to admit these students to Donelson High School regardless of the length of their hair, or of the presence of a beard or mustache.

In their complaint plaintiffs allege that by this regulation, and the action of the defendants taken pursuant to it, they are being deprived of rights guaranteed them by the Constitution of the United States. After a hearing, at which all parties were permitted to submit such evidence as they desired, and upon consideration of the evidence therein submitted, the court has concluded that there has been no such deprivation of the constitutional rights of these plaintiffs. The constitutional questions raised by the complaint will be discussed separately below under appropriate headings.

1. *Freedom of Speech.* — Plaintiffs maintain that, by compelling Jackson and Barnes to cut their hair in order to be admitted to public school, defendants are infringing upon their First Amendment right of freedom of ex-

pression. Under the circumstances of this case this contention is wholly without merit.

From the complaint it affirmatively appears that the minor plaintiffs pursue this course of personal grooming for the sole purpose of enhancing the popularity of a musical group in which they perform. Although there are circumstances in which appropriate conduct has been held to be protected by the free speech provision of the First Amendment, *e.g.*, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), this court is aware of no case in which such protection has been afforded to conduct which, as in this case,[1] fails to express any idea or point of view.[2] Therefore, upon consideration, the court is of the opinion that the growing of hair for purely commercial purposes is not protected by the First Amendment's guarantee of freedom of speech.

2. *Due Process.* — Plaintiffs further contend that the actions of defendants have deprived them of the right to a free public education without due process of law as required by the Fourteenth Amendment. From the complaint there appear to be two allegations bearing on the due process question.

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[1] In Davis v. Firment, 296 F. Supp. 524 (E. D. La. 1967), the court held, on facts almost identical to the instant case, that wearing of long hair did not symbolize or express anything, and, therefore, it was not protected by the First Amendment. See also Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5th Cir.), cert. denied. ____ U.S. ____, 37 U.S.L.W. 3135 (1968), where the court, again on almost identical facts, assumed, without deciding, that the growing of hair was protected by the First Amendment, and then held that the school board regulation prohibiting improper attire was a permissible regulation of this First Amendment right.

[2] The mere fact that conduct is expressive of some idea does not bring that conduct under the protection of free speech. United States v. O'Brien, ____ U.S. ____, 20 L. ed. 2d 672 (1968).

First, plaintiffs allege that the defendants took this action against these students without affording them a hearing. The complaint states that the parents had a "meeting" with the Board of Education, but that this was in no sense a "hearing." If, by this allegation, plaintiffs are contending that hearings concerning the disciplining of high school students should have all the procedural safeguards present in a criminal proceeding in a court of law, then the contention certainly cannot be sustained. Minimum procedural requirements necessary to satisfy due process depend upon the circumstances and interests of the parties involved. *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967). To hold that the relationship between parents, pupils and school officials must be conducted in an adversary atmosphere and according to the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved.

Contrary to plaintiffs' allegation, the evidence adduced at the hearing before this court clearly indicates that the plaintiffs were afforded ample opportunity to be heard and that the procedural requirements of due process were met under the circumstances of this case. Plaintiffs were afforded a review of the principal's decision substantially in accordance with the regulations of the Board of Education.[3] The parents of the two students

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[3] The regulations of the Board of Education for review of the decision of a principal are found in Article V, § 3, of the Guide for Professional Personnel, which provides:

"3. SUSPENSION AND EXPULSION OF PUPILS

"a. The principal shall be permitted to suspend a delinquent pupil pending a conference with the parent or guardian; however, he shall refrain from suspending pupils for minor infraction of rules.

[Footnote continued next page]

conferred with the principal, his decision was affirmed by the head of the Pupil Personnel Department after plaintiffs were given an opportunity to state their case, and the decision was again affirmed by the Board of Education before whom the parents appeared and presented their arguments.

Second, plaintiffs allege that the language of the regulation under which these students were denied admission to school is so "vague, overbroad, and undefinable," that it is violative of due process. Plaintiffs rely on *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), in which the Supreme Court reversed a conviction under an unconstitutionally broad criminal ordinance. That holding, however, is inapplicable to a civil case involving a school board regulation which is designed to provide a general policy guideline to school principals. Nevertheless, the record clearly indicates that, as applied to these students, the regulation was not at all vague; but very specific. The principal at Donelson High School had

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[Footnote 3—Continued]

"b. When a pupil is suspended, the principal shall be required to fill out in quadruplicate a special suspension form furnished by the Pupil Personnel Department. The pink copy shall be sent to the Director of Pupil Personnel, the green copy to the Area Superintendent, and the yellow copy kept in the school's files. These forms shall be completed immediately following the suspension.

"c. If the problem is not settled by the parent-principal conference, the case shall be referred to the Pupil Personnel Department.

"d. In the event the problem is not solved by the Pupil Personnel Department, the matter shall be brought before the Director of Schools for investigation, and if he deems it necessary, to the Board of Education, for action.

"e. A pupil who has been suspended shall remain at school until regular dismissal time unless parents can be contacted and can come for the pupil."

interpreted this regulation in such as way as to indicate clearly to all students, including the two involved herein, what was expected of them with regard to personal grooming.[4] Therefore, upon consideration, the court is of the opinion that there has been no violation of these plaintiffs' rights under the due process clause of the Fourteenth Amendment.

3. *Equal Protection.* — Finally, plaintiffs contend that the regulation of the Board of Education and the action taken pursuant thereto deprives these students of the equal protection of the law guaranteed by the Fourteenth Amendment. This contention must also be rejected. The evidence presented at the hearing unquestionably indicates that the regulation has a real and reasonable connection to the successful operation of the educational system in that it is reasonably calculated to maintain school discipline. Therefore, the regulation does not operate as an unreasonable classification of those students who may or may not get a free public education. Further, the record is absolutely devoid of any proof that the regulation's application in this case was the result of selective enforcement of the regulation against these students, so as to sustain the allegation that they have been denied equal protection of the law.

For the foregoing reasons, therefore, the court is of the opinion that the plaintiffs have failed to establish that

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[4] Principal Edwards testified that he had interpreted the regulation in such a way as to impose three requirements with regard to the length of hair for boys: (1) no part of the ears should be covered; (2) the hair should not touch the eyebrows in front; and (3) the hair should not be so long as to turn up in the back. By the decision rendered herein, the court states no opinion as to whether this interpretation is the proper one for any particular case. The court holds only that, under the circumstances of this case, the regulation, as interpreted, did not operate to deprive these plaintiffs of their constitutional rights.

they have been deprived of any right under the Constitution of the United States by the actions of these defendants.[5].

/s/ FRANK GRAY, JR.
United States District Judge

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[5] Since plaintiffs have failed to establish any deprivation of their rights under the federal Constitution, the court finds it unnecessary to reach the questions raised by the allegation in the complaint that plaintiffs were denied rights under the Constitution of the State of Tennessee.

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SUPREME COURT, U. S.

AUG · 5 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 355

MICHAEL JACKSON, b/n/f, his father, JOE W. JACKSON; JOE W. JACKSON; DOROTHY F. JACKSON; BARRY STEVEN BARNES, b/n/f, his father, BILLY BARNES; BILLY BARNES; and SHIRLEY BARNES,
Petitioners,

vs.

C. R. DORRIER, K. HARLAN DODSON, JR., FRANK GRISHAM, L. C. BIGGS, I. T. CRESWELL, MRS. IRWIN B. ESKIND, WALDEN S. FABRAY, MRS. C. F. MAGER, and S. L. WRIGHT, JR., all being members of the Metropolitan County Board of Education of Nashville, Davidson County, Tennessee; DR. JOHN H. HARRIS, Metropolitan Director of Schools; and JIMMY EDWARDS, Principal of Donelson High School,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 355

MICHAEL JACKSON, b/n/f, his father, JOE W. JACKSON; JOE W. JACKSON; DOROTHY F. JACKSON; BARRY STEVEN BARNES, b/n/f, his father, BILLY BARNES; BILLY BARNES; and SHIRLEY BARNES,

Petitioners,

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C. R. DORRIER, K. HARLAN DODSON, JR., FRANK GRISHAM, L. C. BIGGS, I. T. CRESWELL, MRS. IRWIN B. ESKIND, WALDEN S. FABRAY, MRS. C. F. MAGER, and S. L. WRIGHT, JR., all being members of the Metropolitan County Board of Education of Nashville, Davidson County, Tennessee; DR. JOHN H. HARRIS, Metropolitan Director of Schools; and JIMMY EDWARDS, Principal of Donelson High School,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

(1) Whether requiring as a condition to remaining in a public school a male student (whose unusually long

hair has disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, interfered with the educational process, and created problems of school discipline) to cut his hair to an extent that it will not be a disturbing influence in class or school violates a right of privacy of the student or his parents under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

(2) Whether, if a male public school student and his parents have a right of privacy which embraces his wearing of unusually long hair, this right is paramount to the right and obligation of public school authorities to require him as a condition to remaining in school to cut his hair pursuant to a pre-existing regulation to a length that he will not continue to be such a disturbing influence in class and school as to impede teachers and administrators in carrying out their duties to provide an education, as to interfere with the rights of other students to receive instruction free of such disturbances, and as to create problems of school discipline.

(3) Whether the suspension of a male student from public high school, under a regulation authorizing the suspension of a student whose mode of dress causes him to be a disturbing influence in class or school, when his unusually long hair has disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, interfered with the educational process, and created problems of school discipline, violates the due process clause of the Fourteenth Amendment.

(4) Whether suspending from public high school a male student (whose unusually long hair has disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, interfered with the educational process, and created problems of school

discipline) under a pre-existing regulation authorizing the suspension of a student whose mode of dress causes him to be a disturbing influence in class or school is "abridging the freedom of speech" in violation of the First Amendment.

(5) Whether a regulation which authorizes the suspension of a public school student who "is a disturbing influence in class or school because of his mode of dress," which is interpreted in advance to a male student whom it regulates as including hair beyond a specified length, and which is applied to the same student whose unusually long hair has disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, interfered with the educational process, and created problems of school discipline is an unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Metropolitan County Board of Education of Nashville and Davidson County, Tennessee (hereinafter "the Board"), has a regularly adopted policy that:

> "Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A student is not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement." (A. 176, 97).

Under this policy the students at Donelson High School are told, as to hair on male students, that hair in the front may not come below the eyebrows, ears must show clear of hair, hair in the back is to be tapered and not be long enough to turn up, and there is to be no moustache and no beard (A. 76). These rules as to hair are communi-

cated to Donelson students each year by announcements over the intercom, they are announced in assembly programs, they are discussed in home rooms, and they are the subject of conferences with individual students (A. 75-76, 72).

The infant petitioners in this case, Michael Jackson and Barry Barnes, while students in Donelson High School, began to run afoul of the above rules during the 1967-68 school year. During that year Jackson and Barnes were active in a rock combo, the Purple Haze, whose members were long-haired young males. Barnes was absent 38 days, and Jackson was absent 46 days and tardy 24 days during that year (A. 173, 174-175, 109, 113-114), Jackson missing one of his classes 61 days during the year (A. 104). Jackson admittedly missed school several times because of Purple Haze engagements (A. 38, 105-106). The Principal, Jimmy Edwards, wrote Jackson's parents in October 1967 concerning Jackson's absences and tardiness, remarking that Jackson came by the school on some nights when he had been absent during the day, and played with his group for the school's homecoming dance one night when he had been absent from school the same day (A. 172, 78). Jackson's absences and tardiness created disturbances in his classrooms (A. 109-110, 113-114, 106), he appeared resentful at being given make-up work, and his attitude seemed to be to get by with as little work as possible to pass (A. 113-114). The grades of both boys dropped off, Jackson ending the year with grades of D, C, F, D, D+, and B (Physical Education) in his various courses (A. 173), and Barnes with grades of D, F followed by a drop, D, D+, C+ (Art), F, and B (summer 1967) in his various courses (A. 174).

In the spring of 1968, Jackson and Barnes had long hair but not as long as it was when they attempted to

re-enter school on September 3, 1968, for the next term (A. 19-20, 27, 42, 54, 105), and Barnes did not have bangs, a moustache, a beard, and sideburns extending to the jaw in the spring of 1968, although he had them in the fall of 1968 (A. 28). Conferences with the principal about hair occurred during the 1967-68 school year, in which the principal told Barnes he would have to get his hair cut before returning to school (A. 45). Barnes' mother told the principal that he would not return to Donelson in the fall of 1968, but would change schools (A. 29), and the principal allowed Barnes and Jackson to finish out the year at Donelson (A. 29, 40-41).

However, even by now, the long hair was a disturbing factor in class from the standpoint of teachers (A. 186, 120-122). Barnes appeared sullen at remarks students made about his hair, and became more of a problem (A. 121-122).

On May 22, 1968, the manager of Barnes' and Jackson's combo sent by Barnes a letter to the principal, stating that if the principal made Barnes cut his hair the manager would take the principal to court (A. 45).

Although the complaint (A. 5) states that during the summer the Purple Haze played without difficulty or trouble, there were several occasions when disturbances seemed to be on the verge of occurring involving one or more of these long-haired youths. At Dons Den, a place for dances and other functions for Donelson High students (A. 60), on August 2, 1968 (A. 154-155), one of the Purple Haze, Randy Kennedy, upon hearing that a member of the Donelson football squad was talking about cutting Barnes' hair, stated from the stage loud enough for others to hear (A. 63-64) that if anybody wanted to cut Barnes' hair to come on up there (A. 154-155). Kennedy testified: "We're very proud of what we've got. If

it is long hair, we'll fight for it and they wanted to fight. They were agitating us and antagonizing us and we told them to come on." (A. 64).

On August 16, 1968, at Donelson Plaza, a shopping center, a contest between rock bands, called the "Battle of the Bands" was held (A. 47). It had been rumored that a group of boys from Hume-Fogg High School, another school in Nashville-Davidson County, were threatening to appear at the contest and cut Barnes' and Jackson's hair and hair of other long-haired boys (A. 48, 55-56). One member of the Purple Haze asked a nonmember to be present in case trouble started (A. 137). The boys that came, however, were told to leave by Donelson football players "who were on our [Purple Haze] side" (A. 62).

When the new school term opened on September 3, 1968, Barnes and Jackson presented themselves at Donelson High with unusually long hair on various parts of their faces. Jackson had hair over the lapel of his coat in the back, down to the tip of his ear lobes on the side, and sideburns and a moustache (A. 19-20). Barnes had a moustache and beard, sideburns down to the jaw, and hair to the shoulders (A. 28). The Court characterized their hair as "being very long, completely covering their ears and hanging below their collars. In addition, both students wore moustaches and one also wore a beard" (A. 179). There were no other students and no teachers at Donelson with moustaches or beards, and no other male students there with hair so long as Barnes' (A. 42, 44).

On this first day of school, when Jackson came to his homeroom, several students made comments to the teacher about Jackson's hair disturbing the room, in the teacher's opinion (A. 111). Other students in the class talked among themselves in the classroom about the long hair,

terming it "ridiculous" and speculating that Barnes and Jackson would be "kicked out" (A. 127). Jackson's shop teacher told him that under shop safety rules he would be unable to participate in the shop work because the length of his hair and beard was a hazard, and the teacher considered Barnes' presence in the shop class under those circumstances a disturbance in the class (A. 107). When Barnes walked by the classroom door of another teacher, his appearance completely disrupted the class for about five minutes (A. 184). The excitement continued even on the football practice field, as Barnes and another member of the Purple Haze drove up to the field in a car on September 3, 1968, resulting in a number of the players coming over to have a look (A. 50-52, 137-138).

The principal invoked the previously-announced rules and sent Barnes and Jackson home on September 3 on suspensions for violating those rules. The principal followed the Board's procedures for suspension of pupils as set out in Article V, paragraph 3 of the Guide for Professional Personnel (A. 84-85, 168). There were conferences with parents of the boys (A. 79, 84), suspension forms were filled out with copies sent to the parents (A. 85), and the case was referred to the Pupil Personnel Department (A. 85). The Director of Pupil Personnel Services had a conference with parents of Barnes and Jackson (A. 86-89), in which she advised them of their right to go to the Director of Schools and to the Board (A. 88). The parents went to the Board, which waived a rule requiring at least a 3-day notice of a request for a hearing, and which on September 19, 1968, heard the parents (A. 170-171). The parents were allowed to make complete statements and to question the principal before the Board (A. 100-101). The Board sustained the principal's action (A. 171).

The complaint states that "The sole purpose for Barnes and Jackson's appearance is to enhance their profession" (A. 5). As noted above, the then manager of Barnes' and Jackson's combo (Robert E. Benderman) had on May 22, 1968, stated that if the principal made Barnes cut his hair the manager would take the principal to court (A. 45). The complaint further stated that the promoter of the Purple Haze, Emiley Bradshaw, had "at all times supported their right to maintain their appearance," believing the group's popularity would diminish if the boys were required to cut their hair (A. 4-5). The parents made the plea to the Director of Pupil Personnel Service that to have long hair was important to the boys' "profession" (A. 88), and Jackson's mother asked the Board to consider letting the boys back in school "with their hair like that because of their profession" (A. 16). The press covered the efforts that were being made to get these Purple Haze members back in school without haircuts (A. 90-93). One of the members of the Purple Haze, Joseph Byron Ingram, in a discussion about the combo with one of his teachers, David Keith Scott, told Mr. Scott on September 20, 1968, that "the agent was trying to get as much publicity as it is possible from this proceeding," the "proceeding with Mr. Barnes and Mr. Jackson concerning the hair suspension from school" (A. 110-111). And during September 1968 (A. 56-57) Jackson in response to a comment by a teacher, Paul E. Pigue, that "you sure got a lot of publicity out of this, haven't you?" answered, "Yes, that was one of the main reasons. We got three jobs out of it already" (A. 107).

After the trial of this case, one of the infant petitioners, Michael Stephen Jackson, returned to the Donelson High School and graduated therefrom on June 9, 1970; and the other infant petitioner, Berry Stevens

Barnes, also returned to school after reaching the age of 17, at which age the Tennessee compulsory school attendance law, Tenn. Code Ann. §49-1708,* no longer applies, dropped out of the Donelson High School on February 20, 1970. See Appendix hereto, *infra*.

Jackson and Barnes' complaint was dismissed in the United States District Court for the Middle District of Tennessee (A. 156-165), after an evidentiary hearing. The Court ruled on only three issues: (1) Did the action of the school officials infringe on Jackson's and Barnes' First Amendment right of freedom of expression? (2) Did the officials deny Jackson and Barnes of the right to a free public education without due process of law as required by the Fourteenth Amendment, because of failure to afford them a hearing or because the regulation applied to them was vague, overbroad, and undefinable? (3) Did the officials through the regulation and action taken deprive these students of equal protection of the laws guaranteed by the Fourteenth Amendment—did the regulation operate as an unreasonable classification or was it selectively enforced against them? These were the issues raised by the complaint (A. 6), and asserted by counsel at the hearing (A. 9-10). The court ruled against Jackson and Barnes on each of these issues. There was nothing in the pleading or argument about "privacy" or the Third, Fourth, or Ninth Amendments. Yet, Jackson and Barnes assigned to the Court of Appeals for the Sixth Circuit "errors" based on these "issues." The Court of Appeals affirmed the District Court judgment on every

* Tenn. Code Ann. §49-1708: "Every parent, guardian, or other person residing within the state of Tennessee, having control or charge of any child or children between the ages of seven (7) and sixteen (16) years, both inclusive, shall cause such child or children to attend public or private day school, and in event of failure to do so, shall be subject to the penalties hereinafter provided."

point, "holding that the District Court committed no error in dismissing the present case." *Jackson* v. *Dorrier*, 424 F.2d 213, 219 (6th Cir. 1970).

See also the Court of Appeals' statement of facts. 424 F.2d at 215-217.

ARGUMENT FOR NOT GRANTING THE WRIT

1. Petitioners are wrong in contending that the Courts of Appeals are in conflict as to the questions in the instant case. Respondents believe that the Seventh Circuit, which decided *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 90 S.Ct. 1836 (1970), and the Fifth Circuit, which decided *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968), both would have decided the instant case (had they had it) on its record the way the Sixth Circuit did, affirming the district court in upholding the suspensions by the board of education. The Seventh Circuit distinguished the *Breen* case on its facts from the Sixth Circuit's *Ferrell* decision, citing the *Breen* trial court's finding that there was not "any disruption or disturbance caused by the length of his hair." *Breen* v. *Kahl*, 419 F.2d 1034, 1037 (7th Cir. 1969). In the instant case, the Court of Appeals for the Sixth Circuit found "substantial evidence in the record" to support the conclusion that excessively long hair by male students in the Donelson High School "disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students and interfered with the educational process," and that the infant petitioners' excessively long hair had produced such results in that school and had "created problems of school discipline." *Jackson* v. *Dorrier*, 424 F.2d 213, 216-217 (6th Cir. 1970).

A fair analysis of the United States District Court decisions and the state court decisions cited at pages 5-7 in the Petition for Certiorari herein indicates general agreement among the lower courts that a school board may constitutionally formulate and apply a hair regulation so as to dismiss a male student whose long hair has been substantially disrupting the school, the classroom, and the educational process.

In addition to the eight cases cited by petitioners at pages 6-7 of their petition, the following decisions have upheld the application of hair regulations:

9. *Marshall* v. *Oliver*, Circuit Court of the City of Richmond, Virginia, No. B-2932, December 20, 1965 (unreported), *cert. denied*, Virginia Supreme Court of Judicial Appeals, November 23, 1965 (unreported), *cert. denied*, 385 U.S. 945 (1966).

10. *Contreras* v. *Merced Union High School District*, No. F-245-CIV (E.D. Calif. Dec. 13, 1968) [unreported, cited in *Sims* v. *Colfax*, 307 F. Supp. 485, 488 (Iowa 1970)].

11. *Gianiggeco* v. *Center School District*, Civ. No. 17661-3 (W.D. Mo. Sept. 25, 1969) [unreported, cited in *Jackson* v. *Dorrier*, 424 F.2d 213, 218 (6th Cir. 1970)].

12. *Wood* v. *Alamo Heights Independent School District*, 308 F. Supp. 551 (W.D. Texas 1970).

13. *Pritchard* v. *Spring Branch Independent School District*, 308 F. Supp. 570 (S.D. Texas 1970).

14. *Farrell* v. *Smith*, 310 F. Supp. 732 (D. Me. 1970).

15. *Gfell* v. *Rickelman*, No. C 69 1007 (N.D. Ohio April 28, 1970) (unreported).

16. *Corley* v. *Daunhauer*, No. LR-70-C-14 (E.D. Ark. May 8, 1970) (unreported).

17. *Bishop* v. *Colaw*, No. 70C 111(2) (E.D. Mo. July 24, 1970) (unreported).

18. *Shows* v. *Freeman*, 230 So.2d 63 (Miss. 1969).

Of course, *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); and the instant case, *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir. 1970), are to the same effect, bringing the number of such decisions to twenty. See also, *Schwartz* v. *Galveston Independent School District*, 309 F. Supp. 1034 (S.D. Texas 1970) and *Lovelace* v. *Leechburg Area School District*, 310 F. Supp. 579 (W.D. Pa. 1970). And see *Griffin* v. *Tatum*, 425 F.2d 201 (5th Cir. 1970), *reversing in part*, 300 F. Supp. 60 (M.D. Ala. 1969), a decision relied on by petitioners herein at page 6 of their Petition for Certiorari.

2. Petitioners incorrectly state that "The court below . . . concluded that the slightest inconvenience or disturbance within the public school system" justifies subordinating a child's right to whatever manner of appearance he desires to "tenuous and speculative state interests." The truth is that the Court of Appeals concluded that "The District Court made a finding of fact to the effect that the regulation here attacked, as interpreted and enforced by the principal of Donelson High School, has a real and reasonable connection with the successful operation of the educational system and tends to help maintain school discipline * * * We find substantial evidence in the record to support the findings of the District Judge. There is evidence to support the conclusion that the wearing of excessively long hair by male students at Donelson High School disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students and interfered with the educational process."

Jackson v. *Dorrier*, 424 F.2d 213, 216 (6th Cir. 1970). And, see the same source at pages 216-217 detailing the evidence of record of disturbances and distractions in the Donelson High School caused by these two infant petitioners leading the Court to conclude that "The Record establishes that the deliberate flouting by Jackson and Barnes of this well publicized school regulation created problems of school discipline." *Id.* at 217.

Certainly the record in this case well establishes the fact that more than slight inconveniences or disturbances occurred. And, how can it fairly be said in these days of disorder and turmoil on many campuses that the state interests in having instruction and learning going on in a school of hundreds of other students without distraction and interference, and in maintaining school discipline, are "tenuous and speculative"?

3. The record, quoted and referred to hereinabove, is contrary to the assertion at page 7 of the Petition for Certiorari herein that "Here, unlike *Ferrell*, there was no public display, no substantial disruption of school functions . . . ."

4. A further reason for not granting a Writ of Certiorari herein is that the case has become moot. After the trial was held and the record made, both infant petitioners returned to the Donelson High School, and one of them, Michael Stephen Jackson, graduated therefrom on June 9, 1970, while the other, Barry Steven Barnes, dropped therefrom on February 20, 1970, for "lack of interest in school," following attainment of the age of 17 at which age he was no longer compelled by the state compulsory attendance law. (Tenn. Code Ann. §49-1708, quoted at p. 9, *supra*). See Appendix hereto, *infra*.

CONCLUSION

Four times now, the Supreme Court has denied certiorari in "hair" cases:

Marshall v. *Oliver*, 385 U.S. 945 (1966).

Ferrell v. *Dallas Independent School District*, 393 U.S. 856 (1968).

Akin v. *Board of Education*, 393 U.S. 1041 (1969).

Breen v. *Kahl*, 90 S.Ct. 1836 (1970).

Respondents believe that the Court denied certiorari in all of the cases, being satisfied in each of the first three that on the record the "hair" regulation was constitutionally applied under circumstances of disruption of educational processes and discipline, whereas, in the fourth case the record did not disclose any disruption or disturbance caused by long hair so as to justify the application of the regulation to suspend student violators thereof. In the instant case, the record is replete with substantial evidence of such disruption of the educational process and of school discipline. The regulation and its application were therefore justified in implementing the state's overriding concern for instruction and learning without disruption and for discipline in the school and classroom. And these are very real and important concerns in these times—far from the mocking description of "makeweights and vague generalities."

ROBERT E. KENDRICK
Deputy Metropolitan Attorney
204 Metropolitan Courthouse
Nashville, Tennessee 37201
Attorney for Respondents

G R A D U A T E

Pupil: Jackson (Last) Michael (First) Stephen (Middle)

Birthdate: 10-21-51

Race: ☐ NEGRO ☒ WHITE ☐ OTHER

Parents: Mr. and Mrs. Joe W. Jackson

School: Donelson High School

Principal: Jimmy Edwards. Date Leaving: 6-9-70
(Month)-(Year)

A2

STATISTICAL DROPOUT CARD

(1)

Name Barnes, Barry Steven Birthdate 3/8/52 M ✓ F
(last) (first) (middle)

Date of Dropping Out Feb 24-1970 School Donelson High Age When Dropped 17

Address 6639 Cortez W Grade 10 Phone 883-1761

Parent or Guardian (circle one) Mr. & Mrs. Billy B. Barnes

Financial Status: Low ____ Middle ✓ Upper ____

Physical Health: Poor ____ Average ✓ Above Average ____

Status of MAJORITY of Pupil's Work at Time of Dropout: Passing ✓ Failing ____

Pupil was Working at ____ Below ____ or Above ____ Grade Level

Attendance Record: Poor ____ Average ____ Above Average ____

Elementary School Record: Grades Repeated (specify each grade repeated) 3 grade

Total No. Schools Attended 4 Special Education Class: Yes ____ No ✓

Reason for Leaving as Determined by School: Lack of interest in school

Test Results:

	I.Q.	Reading	Achievement Test Batt. Mdn.
Score	113	45	45
Test	Otis Quick-Scoring	Metropolitan Achievement	Metropolitan Achievement
Date	10/62	9/67	9/67

A3

NOTICE OF TRANSFER—METROPOLITAN SCHOOLS OF NASHVILLE AND DAVIDSON COUNTY—NASHVILLE, TENNESSEE

	Last Name	First	Middle	Grade	Birthdate	Sex B	Sex G
Pupil	BARNES	BARRY	STEVEN	11	3-8-52	X	
Parent or Guardian:	MR. AND MRS. BILLY BARNES				Occupation		

Data from School Child is Leaving

1. Name of School: Donelson High
2. Pupil's Old Address: Hermitage, Tenn
3. Date of Last Attendance: 2-20-70
4. No. Days on Roll: 102 5. No. Days Pres.:
6. Times Tardy: 7. Unexcused Abs.:
8. Date Pupil Withdrawn: 2-20-70
9. Jimmy Edwards
Principal

Please fill in items 10-15 and return to Central Office, Metropolitan Schools of Nashville and Davidson County, Nashville, Tenn.

Data on School Child is Entering

10. Name of School: DROPPED W7
11. P. O. Address:
12. Pupil's New Address:
13. With Whom Living:
14. Date Child Entered:
15.
Principal

Make in triplicate. Give WHITE copy to child for new principal. Attach PINK* copy to the cumulative record. If transferring out of the Metro. System, send by delivery to the Central Office. If transferring to another Metro. School, send on delivery directly to the school.

*Data, if available, should be entered by the sending teacher or principal. Be sure to secure new address.

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